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No. 90-6113

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RANDALL D. WHITE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Writ of Certiorari from
the Supreme Court of Illinois

AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex rel. DANIEL E. LUNGREN, ATTORNEY GENERAL, and the STATES OF

ALABAMA, ALASKA, COLORADO, CONNECTICUT, FLORIDA, IDAHO, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OHIO, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, AND WYOMING

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QUESTION PRESENTED

Does the Confrontation Clause require the prosecution to show that a child witness is unavailable to testify before the child's out-of-court declarations are admitted against a criminal defendant at trial?

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Amici file this brief pursuant to Rule 37.5 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is respectfully submitted in support of respondent, the State of Illinois, which urges affirmance of *White v. Illinois*, 198 Ill.App.3d 641, 555 N.E.2d 1241 (1990), a decision of the Fourth District Appellate Court of Illinois. That court upheld the admission of hearsay evidence by a child sexual abuse victim without a showing that the child was unavailable to testify. The Supreme Court of Illinois denied leave to appeal.

The states have a strong interest in the effective prosecution of child abusers, and the admission of reliable hearsay evidence is often essential to maintaining this interest. Frequently, a child victim's out-of-court statements regarding the offense will be the best evidence in the case. Under these circumstances, reliance on the

out-of-court-statements is necessary, and the utility of confrontation is slight.

The states also have a compelling interest in protecting the emotional well-being of child abuse victims. In a great number of these cases, this interest can best be effectuated if the child is not required to be examined through the judicial process.

If a child's out-of-court statements are made under circumstances rendering it likely that their probative value and reliability cannot be duplicated even if he or she testifies at trial, and if the utility of confrontation is negligible, the states' interest in protecting child victims from further trauma warrants limiting a defendant's right to confront the witness against him by admitting the statement without a showing that the child is unavailable to testify. Accordingly, amici oppose Mr. White's contention that the Confrontation Clause compels the prosecution to produce a hearsay declarant or to show the child declarant is unavailable prior to the admission of an

out-of-court statement that meets the foundational requirements for admission under the exceptions to the hearsay rule for either spontaneous statements or statements made for purposes of medical treatment or diagnosis.

SUMMARY OF ARGUMENT

The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to be confronted with the witnesses against him. The right is not absolute, however, and it may be limited if competing interests and the necessities of the case dictate. Accordingly, this Court has held that hearsay evidence may be admitted in a criminal trial, without offending the Confrontation Clause, if the evidence is both necessary and reliable.

The rule of necessity is satisfied if either the declarant of the out-of-court statement is unavailable to testify or the out-of-court assertion is evidence that cannot be replicated even if the declarant testifies. Evidence admitted under the two exceptions to the hearsay rule at issue in this case, the exception for spontaneous statements and the exception for statements made for purposes of medical diagnosis or treatment, particularly when the declarant is a victim of child abuse, is probative evidence

that cannot be replicated. Hence, the rule of necessity is satisfied, and the child need not be shown to be unavailable to testify before her out-of-court statements are admitted.

Additionally, these two exceptions are firmly rooted exceptions to the hearsay rule. Accordingly, reliability of statements that meet the foundational requirements of these exceptions can be inferred, and no showing of particularized guarantees of trustworthiness need be made.

ARGUMENT

I

THE CONFRONTATION CLAUSE DOES NOT REQUIRE THE PROSECUTION TO SHOW THAT A WITNESS IS UNAVAILABLE TO TESTIFY BEFORE HEARSAY EVIDENCE MAY BE ADMITTED IN A CRIMINAL TRIAL IF THE EVIDENCE IS OTHERWISE NECESSARY

The Confrontation Clause of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The primary object of this provision was to prevent the early common law practice of using secret, ex parte depositions, made by persons not in court, as evidence against an accused. See *California* v. *Green*, 399 U.S. 149, 156-157 (1970); *Mattox* v. *United States*, 156 U.S. 237, 243 (1985); 5 Wigmore, Evidence, § 1364, at 13-14, 28, § 1395, at 150, § 1397, at 159 (Chadbourn rev. 1974) [hereafter "5 Wigmore"]. The theory underlying the Confrontation Clause is that the many possible sources of inaccuracy and trustworthiness

that may underlie the assertions of a witness can best be brought to light through cross-examination of the witness while he testifies under oath in the jury's presence. See *Maryland* v. *Craig*, 497 U.S. ___, 110 S. Ct. 3157, 3163 (1990); *Green, supra*, at 158.

The right of confrontation is not absolute, however. This Court has found that competing interests, if closely examined, may justify limiting the right of confrontation at trial. *Ohio* v. *Roberts*, 448 U.S. 56, 64 (1980); *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973). "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Roberts, supra*, at 64, citing *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934), and *California* v. *Green*, *supra*, 399 U.S. 149.

Thus, the Court has consistently held that the Confrontation Clause does not necessarily prohibit the admission of hearsay statements against a criminal

defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause. *Idaho* v. *Wright*, 497 U.S. ___, 110 S. Ct. 3139, 3145-3146 (1990).[1/] The Court has recognized that the general rule set forth in the Clause must occasionally give way to the necessities of the case. *Maryland* v. *Craig*, *supra*, 110 S. Ct. at 3165-3166; *Mattox* v. *United States, supra*, 156 U.S. at 243 (1985).

In *Ohio* v. *Roberts*, *supra*, 448 U.S. 56, this Court laid out a general approach for determining when hearsay statements may be admitted without violating Confrontation Clause requirements. The approach strikes a delicate balance between the states' interest in law enforcement and a defendant's right to confront the witnesses against him and to assure the accuracy of the

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1. Likewise, this Court has held that the Confrontation Clause does not prohibit a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by way of one-way closed circuit television, even though the use of such a procedure might seem to violate the literal terms of the Clause. See *Maryland* v. *Craig, supra*, 110 S. Ct. 3157.

truth-finding function. "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.[2/]" *Id.* at 65. In addition, the hearsay statement must bear adequate "indicia of reliability" to ensure accuracy in the fact-finding process. *Ibid.*

Five years after *Roberts*, in *United States* v. *Inadi*, 475 U.S. 387 (1986), this Court considered the question of whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a non-testifying co-conspirator. *Id.* at

2. The Court noted here, in a footnote, that a demonstration of unavailability is not always required. *Roberts, supra*, 448 U.S. at 65 n. 7. It continued, "In *Dutton* v. *Evans*, 400 U.S. 74 (1970), for example, the Court found the utility of trial confrontation to be sufficiently remote that it did not require the prosecution to produce a seemingly available witness." *Roberts, supra*, at 65 n. 7.

391.3/ Citing the statement in *Roberts* that the Sixth Amendment establishes a rule of necessity, the Court of Appeals had held that the Confrontation Clause established an independent requirement that the prosecution, as a condition to admission of any out-of-court statement, was required to show the unavailability of the declarant. *Id.* at 391-392. This Court disagreed, declaring that the lower court's interpretation of *Roberts* would effectuate a "wholesale revision of the law of evidence" and would too broadly interpret the Confrontation Clause. *Id.* at 392-394.

The Court then declared that there are good reasons why the unavailability rule, which was developed in cases involving former testimony, is not applicable to

3. The Court noted in *Inadi* that the reliability of the out-of court statements was not at issue in the case. The Court of Appeals had determined that whether or not the statements were reliable, their admission violated the Sixth Amendment because the prosecution had not shown that the declarant was unavailable to testify. *Inadi, supra*, at 391 n.3.

co-conspirators' out-of-court statements. *United States* v. *Inadi, supra*, 475 U.S. at 394.

> "Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony . . . there is little justification for relying on the weaker version. . . .
>
> "Those same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. . . . [¶] In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. . . . [C]o-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence."

Id. at 395-396.

The Court found, in the context of co-conspirators' statements, that the benefits of an unavailability rule would be slight, for it would contribute little to the truth determining process. *United States* v. *Inadi, supra*, 475 U.S. at 396-398. The burden that such a rule would impose would be significant, however: it would automatically add another avenue of appellate review in these complex cases, and it would place a significant practical burden on the prosecution. *Id.* at 398-399. Accordingly, the Court declined to require a showing of the declarant's unavailability as a prerequisite to the admission of a co-conspirator's hearsay statement. *Id.* at 400.

Read together, *Roberts* and *Inadi* explain that the rule of necessity for resorting to out-of-court statements may be satisfied in one of two ways. First, the declarant of the out-of-court statement may be unavailable to testify, so that if his statement is not admitted, his knowledge will be left unused altogether. Or, the out-of-

court assertion may be such that it is not possible to get evidence of the same value from any other source, so that if the extrajudicial statement is not used, the trier of fact is denied important evidence. See *United States* v. *Inadi, supra*, 475 U.S. 387; *Ohio* v. *Roberts, supra,* 448 U.S. 56; see also 5 Wigmore, *supra,* §§ 1420-1421, at 251-253. Regardless of which way the necessity requirement is satisfied, if the out-of-court statement is trustworthy, so that the test of confrontation would be of minimal benefit, its admission is constitutionally permissible. See *Inadi, supra*; *Roberts, supra*; see also 5 Wigmore, *supra*, §§ 1420-1422, at 251-253.

II

UNAVAILABILITY OF THE DECLARANT SHOULD NOT BE REQUIRED AS A CONDITION OF ADMISSIBILITY OF A CHILD VICTIM'S OUT-OF-COURT STATEMENT UNDER THE EXCEPTION TO THE HEARSAY RULE FOR SPONTANEOUS STATEMENTS

A. The Exception for Spontaneous Statements

An exception to the hearsay rule for certain statements made under the influence of a startling event is universally recognized.[4] E. Cleary, McCormick on

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4. A majority of states have adopted either the Federal Rule of Evidence on spontaneous statements, Rule 803(2), or a draft version thereof: Alaska Rules of Evid., Rule 803(2) (1979); Ark. Stat. Ann. § 28-1001 Uniform Rules of Evid., Rule 803(2) (1976); Ariz. Rev. Stat. Ann. Rules of Evid., Rule 803(2)(1977); Colo. Rules of Evid., Rule 803(2) (1980); Del. Uniform Rules of Evid., Rule 803(2) (1980); Fla. Stat. Ann. Evid. Code § 90.803(2) (1979); Hawaii Rules of Evid., Rule 803(b)(2) (1981); Idaho Rules of Evid., Rule 803(2) (1985); Iowa Rules of Evid., Rule 803(2) (1983); La. Code of Evid., Art. 802(2) (1989); Me. Rev. Stat. Ann., Rules of Evid., Rule 803(2) (1976); Mich. Rules of Evid., Rule 803(2) (1978); Minn. Rules of Evid., Rule 803(2) (1977); Miss. Rules of Evid., Rule 803(2) (1986); Mont. Rev. Codes Ann. § 93-3002, Rules of Evid., Rule 803(2) (1977); Neb. Rev. Stat. §27-803(1) (1975); Nev. Rev. Stat. tit. 4, § 51.095 (1971); N.H. Rules of Evid., Rule 803(2) (1985); N.M. Stat. Ann. Rules of Evid., Rule 803(2) (1976); N.C. Rules of Evid., Rule 803(2) (1984); N.D. Rules of Evid., Rule 803(2) (1977); Ohio Rules of Evid., Rule 803(2) (1980); Okla. Stat. Ann. tit. 12, § 2803(2) (1978); Or. Evid. Code, Rule 803(2) (1982); R.I. Rules of Evid., Rule 803(2) (1987); S.D. Rules of Evid.,

Evidence (3d ed. 1984) § 297, at 854 [hereafter "McCormick"]. The foundational requirements for admission of a statement under this exception are three-fold. First, there must be an event that excites the declarant. Second, the statement must be made during the period of excitement caused by the event. And, third, the statement must "relate" to the startling event. 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(2)[01], at 803-87 to -94 (1988) [hereafter "Weinstein"]; 4 Louisell & Mueller, Federal Evidence (1980) § 439, at 494-495 [hereafter "Louisell & Mueller"].[5/] The principle

§ 19-16-6 (1978); Tenn. Rules of Evid., Rule 803(2) (1990); Tex. Rules of Evid., Rule 803(2) (1983); Utah Rules of Evid., Rule 802(2) (1983); Vt. Rules of Evid., Rule 803(2) (1983); Wash. Rules of Evid., Rule 803(a)(2) (1979); W. Va. Rules of Evid., Rule 803(2) (1985); Wis. Stat. Ann. § 908.03(2) (1974); Wyo. Rules of Evid., Rule 803(2) (1978).

Other states, which have not adopted the Federal Rules of Evidence, have either codified a spontaneous statement hearsay exception, e.g., Calif. Evid. Code § 1240 (1965), or have case law establishing such an exception, e.g., *Mouzone* v. *State*, 452 A.2d 661 (Md. 1982); *Commonwealth* v. *Fuller*, 506 N.E.2d 852 (Mass. 1987); *Souder* v. *Commonwealth*, 719 S.W. 2d 730 (Ky. 1986).

5. In determining whether these foundational requirements for admission of the hearsay statement are met, courts consider a variety of factors, including: lapse of time from the event to the statement; whether the statement was made at the first safe opportunity; whether

underlying this exception is based on the experience that when these requirements are met, a stress of nervous excitement may be produced that stills the declarant's reflective faculties and powers of fabrication, so that the utterance that occurs is a spontaneous and sincere expression of the declarant's impressions and belief. 6 Wigmore, Evidence, § 1747, at 195, 199 (Chadbourn rev. 1976) [hereafter "6 Wigmore"]; McCormick, *supra*, § 297, at 855; Fed. Rules of Evid., Rule 803, Advisory Committee Notes.

the statement was made when the excitement was rekindled; the declarant's emotional condition, including crying or sleep patterns; speech pattern of the declarant; declarant's physical condition (statements made during a period of injury or pain caused by the event are likely made during the stress of excitement caused by the event); age of the declarant; nature of the event; content of the statement; spontaneity; whether the statement was elicited by questions; explicit language; whether there are circumstantial guarantees of reliability (corroborating evidence); and the totality of the circumstances. J. Myers, *Hearsay Statements by the Child Abuse Victim*, 38 Baylor L. Rev. 775, 863-875.

B. A Spontaneous Statement is Important Evidence that Cannot be Replicated, and So the Requirement of Necessity is Satisfied

As in *Inadi*, there are sound reasons to find that unavailability of the declarant is not required when a statement is admitted under the spontaneous statement exception to the hearsay rule. Like in *Inadi*, the rule of necessity is satisfied by virtue of the fact that the out-of-court statement is important evidence that cannot be replicated even if the declarant testifies in court.

A spontaneous statement clearly has independent evidentiary significance. Unlike the former testimony at issue in *Roberts*, a spontaneous statement is not similar to live trial testimony. Rather, there is a significant evidentiary difference between spontaneous statements and trial testimony, so that the former is not merely a weaker substitute for the latter. Compare also *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972) [witness' testimony from first trial

introduced at trial; *Barber* v. *Page*, 390 U.S. 719 (1968) [witness' preliminary hearing testimony offered at trial].

Because of the context in which a spontaneous statement is made, the circumstances surrounding the statement, and concomitantly the reliability of the statement, cannot be duplicated. The statement is an unsolicited utterance made without consideration for its testimonial value.

In the same way that the position of co-conspirators vis a vis each other often changes by the time of trial, the relationship of a victim of child abuse and her abuser, when the abuser is a person known to the child, often changes between the time of the crime and trial. It is an indisputable fact that children frequently are ambivalent about identifying family members, friends, or acquaintances as perpetrators of abuse. But, in the heat of the moment following the crime, while the pain, the humiliation, and the fear of the abuse is still fresh, a child may make a spontaneous utterance regarding the abuse.

Not infrequently, however, when the delirium of the event has worn off, she[6] comes to comprehend the consequences of her actions -- she may have to go to court and testify; she may be removed from the home; she may cause the breakup and financial ruin of her family; and she may cause the incarceration of a person for whom she cares -- and she recants. See *Johnson* v. *State*, 732 S.W.2d 817, 823 (Ark. 1987); Summit, *The Child Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177 (1983). Thus, the child is likely to speak differently when under the stress of the event than she would when testifying on the witness stand.

Moreover, in child abuse cases in particular, the fact that the out-of-court statement was made near the time of the abuse may make it more credible than the victim's in-court testimony. Children frequently cannot recall for any significant period of time the details of their

6. For simplicity's sake, amici use the feminine pronoun when referring to child victims and the masculine pronoun when referring to prosecutors and doctors.

abuse. *State* v. *Edward Charles L.*, 398 S.E.2d 123, 132-133 (W. Va. 1990); see *People* v. *Jones*, 792 P.2d 643 (Cal. 1990). Thus, a spontaneous statement, made near the time of the abuse, will often be a more accurate statement of what occurred. Certainly, since the defense bar routinely argues that a child victim's testimony is tainted by law enforcement personnel, mental health professionals, child protective agency workers, and prosecuting attorneys, they cannot reasonably be heard to complain that the admission of a child's statement made before these people have extensive contact with the child is not more reliable than her subsequent testimony.[7]

As aptly noted by Professor Wigmore, a spontaneous statement is "*better than* is likely to be

7. "Indeed, common sense suggests that '[s]ome of the most powerful potential evidence . . . lies in the child's prior out-of-out statements. When a child first reveals that there has been sexual abuse, the content and manner of the revelation is often striking in its clarity and ring of truth.'" *State* v. *Robinson*, 735 P.2d 801, 812 (Ariz. 1987), quoting Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. Social Issues 125, 133 (1984).

obtained from the same person upon the stand." 6 Wigmore, *supra*, § 1748, at 199 [emphasis added]. Hence, it has long been recognized that the superior trustworthiness of a spontaneous statement creates a necessity for resorting to it for unbiased testimony. *Ibid.*, citing, e.g., *Mobile & Montgomery R.R.* v. *Ashcraft*, 48 Ala. 15, 31 (1872) ["We regard these declarations as . . . more convincing . . . than the testimony of the persons themselves some time after the occurrence"].[8/]

The high degree of reliability of a spontaneous statement, particularly when the declarant is a child, significantly diminishes the importance of cross-examination; it is unlikely that even skillful cross-examination will adduce a persuasive repudiation of the prior statement. Indeed, as this Court has noted,

8. Professor Wigmore continued, "It follows that *death*, *absence*, or *other unavailability* of the declarant need never be shown under this exception -- a proposition never disputed." 6 Wigmore, *supra*, § 1748, at 199 [emphasis in original]. See also McCormick, *supra*, § 297, at 855.

> "The basis for the 'excited utterance' exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that *cross-examination would be superfluous*."

Idaho v. *Wright*, *supra*, 110 S. Ct. at 3149 [emphasis added].

For a number of reasons, then, a spontaneous statement, particularly one made by a child abuse victim, is likely to be more reliable and more probative than would be her reconstructed version of events given on the witness stand some months or years after the abuse occurred. At the very least, it is important evidence that cannot be reproduced. Either way, a requirement that the prosecution either produce the child or demonstrate her unavailability before her out-of-court spontaneous statement is admitted "is not likely to produce much

testimony that adds anything to the 'truth-determining process.'" *Inadi, supra*, 475 U.S. at 396.[9]

But, such a rule would impose a significant burden upon the People, and it would serve as a practical bar to the use of statements offered under a well-established hearsay exception. As in *Inadi*, a constitutional rule requiring a determination of availability each time the prosecution seeks to introduce a child's spontaneous statement necessarily would add another avenue of appellate review in these cases, thus imposing a substantial burden on the entire criminal justice system. See *Inadi, supra*, 475 U.S. at 398-399. Additionally, and more important, such a rule would require the prosecution to choose between foregoing the use of important evidence

9. As Wigmore has stated, "If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance) in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured." 5 Wigmore, *supra*, § 1420, at 252.

or subjecting the child to what well may be another traumatic and emotionally damaging ordeal.

If an unavailability rule applies, a prosecutor who desires to introduce a child victim's out-of-court statement will have three options.

He may produce the child. The likely result, of course, will be that the child will be cross-examined about painful and embarrassing issues in a courtroom setting in the presence of not only the defendant, but also the judge, the jury, counsel, and court personnel, and this experience may cause the child further lasting emotional harm:

> "Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination, facing the accused again, the official atmosphere in court, the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony, and the conviction of a molester who is the child's parent or relative."

Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 984 (1969).

Or, the prosecutor may forego using the child's out-of-court statements. This may well mean that the state will be forced to attempt to prove its case without the most probative evidence it possesses.

Finally, he may attempt to demonstrate the child's unavailability. But that attempt, even if successful, will require the child to be examined, either in court or by an expert witness.

For example, if a child is incompetent to testify as a witness, she is, as a practical matter, unavailable because she cannot be subjected to cross-examination. See, e.g., *Lancaster* v. *People*, 615 P.2d 720, 723 (Colo. 1980); *State* v. *Kuone*, 757 P.2d 289, 294-295 (Kan. 1988); *State* v. *Lanam*, 459 N.W. 2d 656, 659 (Minn. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 693; *State* v. *Deanes*, 374 S.E.2d 249, 259 (N.C. 1988), *cert. denied*, 490 U.S. 1101

(1989). A court may not make a finding of unavailability, however, unless the prosecution has produced the child for a competency examination and established incompetency. See e.g., *Deanes, supra*, at 259; *State* v. *Campbell*, 705 P.2d 694, 705 (Or. 1985); *State* v. *Ryan*, 691 P.2d 197, 203 (Wa. 1984).

Likewise, if the victim is one of the many children whose fear of testifying or of facing the defendant makes it psychologically impossible for her to proceed, she is unavailable. See *State* v. *Doe*, 719 P.2d 554, 557 (Wa. 1986); *State* v. *Sheppard*, 484 A.2d 1330, 1334-1337 (N.J. 1984). But, the court cannot make that finding unless the child has been examined either by an expert or by the judge and the court has determined that the potential psychological injury would render the child's testimony relatively impossible. See, e.g., *State* v. *Robinson*, *supra*, 735 P.2d at 813-814; *People* v. *Stritzinger*, 668 P.2d 738, 746-747 (Cal. 1983) *Miller* v. *State*, 531 N.E.2d 466, 468 (Ind. 1988).

Each of these three options carries a price, and the prosecutor will be faced with the difficult decision of determining which price to pay: the loss of probative evidence or the potential additional traumatization of the child victim.

The burdens imposed by an unavailability rule would exist even if it turned out that neither the prosecution nor the defense desired to examine the victim at trial. *Inadi, supra*, 475 U.S. at 398. As this Court has reasoned, under these circumstances, "it is difficult to see what, if anything, would be gained by a rule that requires the prosecution to make the declarant 'available.'" *Ibid.*[10/]

In sum, then, the reliability and the probative value of an out-of-court statement that satisfies the

10. In *Inadi*, the Court noted that the defendant's counsel apparently concluded that the absent declarant's testimony would not have been particularly helpful. The defendant could have demanded the declarant' presence, and the Compulsory Process Clause of the Sixth Amendment would have required his production, but no such request was made. *Inadi, supra*, 475 U.S. at 397-398; see *United States* v. *Quick*, 22 M.J. 722, 726 and 727 n. 4 (A.C.M.R. 1986), *aff'd*, 26 M.J. 460 (C.M.A. 1988).

foundational requirements for admission as a spontaneous statement is reliable evidence that cannot be replicated in court, and this is particularly true when the declarant is a child. Hence, consistent with *Inadi*, the necessity for resorting to this evidence is satisfied, and no showing of the declarant's unavailability should be required prior to the admission of her statement.

III

UNAVAILABILITY OF THE DECLARANT SHOULD NOT BE REQUIRED AS A CONDITION OF ADMISSIBILITY OF A CHILD VICTIM'S OUT-OF-COURT STATEMENT UNDER THE EXCEPTION TO THE HEARSAY RULE FOR STATEMENTS MADE FOR PURPOSES OF MEDICAL DIAGNOSIS AND TREATMENT

A. The Exception for Statements Made for Purposes of Medical Diagnosis or Treatment

All jurisdictions make an exception to the hearsay rule for statements made with a view to treatment. Weinstein, *supra*, ¶ 803(4)[01], at 803-143. The scope of the exception varies considerably, however: some courts admit only statements of present symptoms; others have extended the rule to admit, in addition, statements that describe past symptoms and the nature and cause of the injury insofar as they bear on treatment. See *ibid.*

In its narrowest form, the exception, insofar as it permits a doctor to testify to a patient's out-of-court report of present symptoms, is closely related to the exception for spontaneous statements.[11/] It is grounded in

11. This scope of the exception has been accepted as a specific doctrine since the early 1800's, and for more than a hundred years prior to that time, it was accepted as an indefinite doctrine that did not distinguish clearly between this and the exception for spontaneous declarations. Wigmore, *supra*, § 1714, at 90-91, § 1747, at 196.

the recognition that a person's expressions of contemporaneous bodily feelings, pain or malady "are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence." *Bacon* v. *Charlton*, 7 Cush. 581, 586 (Mass. 1851), quoted in 6 Wigmore, *supra*, § 1719, at 103; see McCormick, *supra*, § 291, at 838-839.[12/]

The broadest scope of the exception is set forth in Rule 803(4) of the Federal Rules of Evidence, which has provided the model for the definition of the medical exceptions in the majority of American jurisdictions.[13/]

12. Despite occasional indications to the contrary, statements of present bodily conditions, because of the rationale underlying them, generally need not have been made to a physician to qualify for admission under this hearsay exception. McCormick, *supra*, § 291, at 838.

13. The following states have adopted Rule 803(4) verbatim or with only minor stylistic changes: Alaska Rules of Evid., Rule 803(4) (1979); Ariz. Rev. Stat. Ann. Rules of Evid., Rule 803(4) (1977); Ark. Unif. Rules of Evid., Rule 803(4) (1976); Colo. Rules of Evid., Rule 803(4) (1980); Del. Uniform Rules of Evid., Rule 803(4) (1980); Hawaii Rules of Evid., Rule 803(b)(4) (1981); Iowa Rules of Evid., Rule 803(4) (1983); *Drumm* v. *Commonwealth*, 783 S.W. 2d 380 (Ky. 1990); La. Code of Evid., Art. 803(4) (1989); Me. Rev. Stat. Ann., Rules of Evid., Rule 803(4) (1983); Miss. Rules of Evid., Rule 803(4) (1986); Mont. Rev. Codes Ann. § 93-3002, Rules of Evid., Rule 803(4) (1977); Neb. Rev. Stat. § 27-803(3) (1985); Nev. Rev. Stat. tit. 4, §

Under this rule, statements regarding not only present symptoms, but also statements of medical history and those regarding causation and fault, are admissible if the statements are reasonably pertinent to diagnosis or treatment.[14]

§ 27-803(3) (1985); Nev. Rev. Stat. tit. 4, § 51.115 (1971); N.M. Stat. Ann. Rules of Evid., Rule 803(4) (1976); N.C. Rules of Evid., Rule 803(4) (1984); N.D. Rules of Evid., Rule 803(4) (1977); Ohio Rules of Evid., Rule 803(4) (1980); Or. Evid. Code, Rule 804(4) (1982); S.D. Rules of Evid., §19-16-8 (1978); Tenn. Rules of Evid., Rule 803(4) (1990); Tex. Rules of Evid., Rule 803(4) (1983); Utah Rules of Evid., Rule 803(4) (1983); Wash. Rules of Evid., Rule 803(4) (1979); W. Va. Rules of Evid., Rule 803(4) (1985); Wis. Stat. Ann. § 908.03(4) (1974); Wyo. Rules of Evid., Rule 803(4) (1978).

The following states have adapted the federal rule in various ways: Fla. Stat. Ann. Evid. Code § 90.803(4) (1979); Idaho Rules of Evid., Rule 803(4) (1985); Ill. Rev. Stat. Criminal Code § 115-13 (1987); Mich. Rules of Evid., Rule 803(4) (1978); Minn. Stat. Ann. Evid. Rule 803(4) (1977); N.H. Rules of Evid., Rule 803(4) (1985); Okla. Stat. Ann. tit. 12, § 2803(4) (1978); R.I. Rules of Evid., Rule 803(4) (1987); Vt. Rules of Evid., Rule 803(4) (1983).

14. Federal Rule 803 states:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

" . . . .

"(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Two independent rationales support this exception. First, it is recognized that the patient's belief that an accurate and truthful statement is important to proper treatment ensures its reliability. See *United States* v. *Renville*, 779 F.2d 430, 436 (8th Cir. 1985); *United States* v. *Iron Shell*, 633 F.2d 77, 83-84 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). Additionally, it is acknowledged that a physician who views the patient's medical history, including cause and fault, as related to diagnosis and treatment would reasonably be expected to communicate this to the patient so as to assure a reliable response. McCormick, *supra*, § 292, at 840. And, as Professor Weinstein has recognized, "[a] fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription." Weinstein, *supra*, ¶ 803(4)[01], at 803-146. This principle acknowledges the fact that life and death decisions are made by physicians in reliance on the facts related by the patient, and thus they should have sufficient trustworthiness to be admissible in a court of law. *Iron Shell*, *supra*, at 84.[15]

15. In *Ohio* v. *Roberts*, *supra*, 448 U.S. 56, the Court stated that the reliability of business records comes from the fact that "records of regularly conducted activities cannot fulfil their function . . . unless they are accurate. Thus, the motive for accuracy is great, while the motive to falsify is virtually non-existent." *Id.* at 66.

Consistent with the two policy justifications supporting the rule, the courts have employed a two-part test for the admissibility of hearsay statements under this exception. First, the declarant's motive in making the statement must be consistent with the purposes of promoting diagnosis and treatment.[16] Second, the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis. *United States* v. *Iron Shell*, *supra*, 633 F.2d at 84; see also *Morgan* v. *Foretich*, 846 F.2d 941, 949 (4th Cir. 1988); *State* v. *Robinson, supra,* 735 P.2d at 809; *Stallnacker* v. *State*, 715 S.W.2d 883, 884 (Ark. App. 1986); *People* v. *Galloway*, 726 P.2d 249, 252-253 (Colo. App. 1986); *State* v. *Maldonado*, 536 A.2d 600, 602 (Conn. App. 1988).

It has been recognized by a number of courts that the cause of a condition is often relevant to

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The two-part rationale underlying the exception for purposes of medical diagnosis or treatment is analogous to that underlying the exception for business records: if a patient does not speak truthfully to her physician, and if the physician does not carefully consider those statements as they relate to a proper diagnosis and treatment, the purposes of seeking and dispensing medical care are thwarted.

16. If a child, because of her tender years, is unable to appreciate the doctor's role, her statements will not satisfy the foundational requirements for admission under this exception. See *W.C.L.* v. *People*, 685 P.2d 176, 181 (Colo. 1984).

diagnosing that condition and deciding upon a course of treatment. See, e.g., *United States* v. *Iron Shell*, *supra*, 633 F.2d at 84-85; *United States* v. *Iron Thunder*, 714 F.2d 765, 772-773 (9th Cir. 1983). The victim's statements often suggest to the doctor the nature of the problem, and information regarding what happened may provide guidelines for the physician's examination by pinpointing areas of the body to be examined more closely and narrowing the examination by eliminating other areas. See *Iron Shell*, *supra*, at 84.

Ordinarily, statements as to fault, including those identifying the victim's assailant, do not qualify as necessary for diagnosis or treatment. *United States* v. *Iron Shell*, *supra*, 633 F.2d at 84; Fed. Rules of Evid., Rule 803, Advisory Committee Notes. Statements of identity seldom are made for the purpose of promoting effective treatment, and physicians rarely have any reason to rely on statements of identity in treating or diagnosing a patient. *United States* v. *Renville*, *supra*, 779 F.2d at 436.

This general rule does not apply in many child abuse cases, however, because in many of these cases the abuser's identity is critical to effective diagnosis and treatment. The Eighth Circuit has explained this exception to the general rule as follows:

Child abuse involves not only physical abuse, but emotional and psychological injuries as well, and the nature and extent of a child's psychological injuries often depend upon the identity of the abuser. Additionally, physicians have a legal obligation to prevent an abused child from being returned to an environment in which she cannot be adequately protected from recurrent abuse, and this obligation is most immediate where the abuser is a member of the victim's household. Information that the abuser is a member of the household is therefore 'reasonably pertinent' to a course of treatment that includes removing the child from the home. When the physician makes clear to the victim that the inquiry into the abuser's identity is important to diagnosis and treatment and the victim manifests such an understanding, the victim's motivation to speak truthfully is the same as that which insures reliability when she recounts the chronology of events or details symptoms of somatic distress. Additionally, statements of identity to a physician by a child who has been abused by a family member are of a type physicians reasonably rely on in formulating a diagnosis and course of treatment. Admission of these statements, therefore, is fully consistent with the two-part rationale underlying the exception to the hearsay rule for

statements made for purposes of medical diagnosis or treatment. *United States* v. *Renville*, *supra*, 779 F.2d at 437-438.

This rule has been adopted by a number of jurisdictions.[17] Subsequent cases have noted that the reason for admitting statements regarding the perpetrator's identity may apply in some other limited circumstances.[18]

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17. E.g., *Morgan* v. *Foretich*, *supra*, 846 F.2d 941, 949-950; *United States* v. *Deland*, 22 M.J. 70 (C.M.A. 1986), *cert. denied*, 479 U.S. 856; *State* v. *Robinson*, *supra*, 735 P.2d at 810; *Stallnacker* v. *State*, *supra*, 715 S.W.2d at 884-885; *People* v. *Galloway*, 726 P.2d 249, 252-253 (Colo. App. 1986); *State* v. *Maldonado*, 536 A.2d 600, 603 (Conn. App. 1988), *app. denied*, 541 A.2d 1239 (Conn. 1988); *In re Rachel T.*, 549 A.2d 27, 34-35 (Md. App. 1988); *State* v. *Aguallo*, 350 S.E.2d 76, 80-81 (N.C. 1986); *Goldade* v. *State*, 674 P.2d 721, 722-728 (Wyo. 1983), *cert. denied*, 467 U.S. 1253 (1984); see also *Nelson* v. *Farrey*, 874 F.2d 1222, 1224-1229 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 835 (1990); *Drake* v. *State*, 761 P.2d 879, 882-883 (Okla. Cr. 1988); *State* v. *Ucero*, 450 A.2d 809, 814-815 (R.I. 1982).

18. In *United States* v. *Provost*, 875 F.2d 172, (8th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 170 (1989), the court admitted evidence regarding the victim's half-brother, who did not continuously reside with the child victim of sexual assault. *Id.* at 176-177. This ruling is consistent with the well-recognized fact that child abuse, and particularly sexual abuse, is frequently committed by persons who do not live with the child but who have recurring access to the child. See *People* v. *Jones*, *supra*, 792 P.2d 643.

In *State* v. *Moen*, 786 P.2d 111 (Or. 1990), the court admitted evidence regarding the son-in-law of the adult victim of a homicide. The statements made by the victim to her doctor before her murder, explaining her depression, directly related to her illness, and

B. A Statement Made for Purposes of Medical Diagnosis or Treatment is Important Evidence that Cannot be Replicated, and So the Requirement of Necessity is Satisfied

As with co-conspirator statements and spontaneous statements, there is good justification for concluding that the declarant need not be shown to be unavailable when her testimony is admitted under an exception to the hearsay rule for statements made for medical purposes. Here, too, the rule of necessity is satisfied by virtue of the fact that the out-of-court statement, particularly when the declarant is a child, is probative evidence that cannot be duplicated even if the declarant testifies in court.

Under the narrower view of the exception, which limits admission to statements regarding present symptoms, the analysis is virtually identical to that for spontaneous statements. First, the statement has independent

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the information was used to diagnose and treat that illness. Hence, her statements were made for the purpose of medical diagnosis or treatment. *Id.* at 118-121.

In addition, in sexual assault cases, the identity of the perpetrator may well be relevant to diagnosis and treatment if an examination of the perpetrator will assist in determining whether the victim may have a sexually transmitted disease. See *In re Rachel T.*, *supra*, 549 A.2d at 35. This would apply, of course, whether the victim is a child or an adult.

evidentiary significance, and thus it is not a weaker substitute for live testimony. Second, because the patient is describing her own physical sensations, the risks of misperception and faulty recollection are less than would be a subsequent recitation of recollected facts. And, third, much of the reliability of the statement is derived from the context in which the statement was made, particularly when the statement is made to a doctor. Accordingly, as Professor Wigmore has explained, the probability that the person's testimony on the stand will be in value equal or superior to the hearsay statement is small, and thus it is desirable to resort to the hearsay statement. 6 Wigmore, *supra*, § 1714, at 90.

Under the broadest view of the exception, the analysis is somewhat different. The conclusion, however, is the same.

The evidentiary value of a statement made for purposes of medical diagnosis or treatment differs significantly from trial testimony. Although both represent, for the most part, the declarant's recollection of past events, the circumstances under which that recollection is elicited differ, and the value of the out-of-court statement cannot be reproduced.

A child's motive for testifying and her motive for providing information to a doctor are wholly dissimilar. Simply stated, it is in a patient's selfish interest to be truthful with her physician. "Like the co-conspirator who does not tell knowing falsehoods during the course of the conspiracy because of his vested interest in its successful outcome, a person who is seeking relief from a physical ailment or injury does not intentionally mislead a listener whose effectiveness in responding depends upon the accuracy of the information he receives." *United States* v. *Quick, supra*, 22 M.J. at 726-727.

As discussed previously, however, by the time of trial, she undoubtedly will have an increased awareness of the ramifications of her statements. In spite of the oath, she may well believe that it could be detrimental to her own interest, as well as the interest of her family, to testify truthfully. *Ante,* at 19-20. Hence, her testimony is likely to be less honest than is her out-of-court statement, which was made in a more relaxed atmosphere and at a time when her sense of self-preservation was strongest.

Additionally, because of the circumstances under which a child's statement for purposes of medical treatment is made, the statement carries strong assurances of accuracy that cannot be duplicated even if the child

testifies at trial. Most commonly, the statement is made shortly after the offense occurred. See, e.g, *State* v. *Robinson, supra*, 735 P.2d at 804; *People* v. *Galloway, supra*, 726 P.2d at 251; *State* v. *Maldonado, supra*, 536 A.2d at 601. In every case, it will have been made closer to the time of the offense than would be her in-court testimony. And, because the doctor has a business duty to maintain patient records, the child's statement will be memorialized. Hence, although months or years may pass between the time of the offense and the time of trial, the statement will provide an accurate record of the child's perceptions at a time when the incident was fresh in her mind. Accordingly, the out-of-court statement will be superior in evidentiary quality to her testimony on the witness stand. See *United States* v. *Quick*, supra, 22 M.J. at 727.

A child's testimony in court will rarely, if ever, recapture the evidentiary significance of her statements made during the course of a medical examination. Stated otherwise, those statements are irreplaceable as substantive evidence. Moreover, given the rationales underlying the exception to the hearsay rule that permits their admission, they possess a high degree of reliability that renders it unlikely that cross-examination would adduce evidence that

persuasively undermines their value. Indeed, as the Seventh Circuit Court of Appeals has aptly stated,

> "[W]e should not allow labels and lawyers' pieties to delude us into believing that cross-examination of a four-year-old child concerning sexual abuse by her father a year earlier is a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the child over a period of many months in a setting designed to elicit truthful communication. There is no basis for believing that T's testifying would have enhanced the accuracy of the jury's determination."

Nelson v. *Farrey, supra*, 874 F.2d at 1230.

Accordingly, as in *Inadi*, a requirement that the prosecution either produce the child or demonstrate her unavailability before her out-of-court statement is admitted "is not likely to produce much testimony that adds anything to the 'truth-determining process.'" *Inadi, supra*, 475 U.S. at 396. As noted previously, however, such a rule would impose a substantial burden upon the People, and it would serve as a practical bar to the use of reliable hearsay evidence, *ante*, at 24-28, and this would be true even in a case in which neither the prosecution nor the defense wished to examine the declarant at trial, *Inadi, supra*, 475 U.S. at 399.

This Court has recognized that the states have a compelling interest in accurate fact-finding and effective law enforcement. *Bourjaily* v. *United States*, 483 U.S. 171, 182 (1987); *Ohio* v. *Roberts, supra*, 448 U.S. at 64. It has also recognized that the states have a strong interest in safeguarding the psychological well-being of children. *Maryland* v. *Craig, supra*, 110 S. Ct. at 3167; *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 (1982). A requirement that the prosecution demonstrate a child's unavailability before her out-of court statements to her doctor can be introduced will thwart the states' efforts to protect both of those interests while doing little to assure the integrity of the fact-finding process. Accordingly, when, in a child abuse case, the foundational requirements for the admission of a statement under the exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment are met, "[a]ny marginal protection to the defendant by forcing the government to call as [a witness a child who is] available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine [the child], cannot support an unavailability rule." *Inadi, supra*, 475 U.S. at 399-400.

IV[19]

THE CONFRONTATION CLAUSE DOES NOT REQUIRE THE PROSECUTION TO DEMONSTRATE PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS PRIOR TO THE ADMISSION OF EVIDENCE UNDER THE EXCEPTIONS TO THE HEARSAY RULE FOR SPONTANEOUS STATEMENTS OR STATEMENTS MADE FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

A. Reliability of an Out-of-Court Statement Can Be Inferred When It Falls Within a Firmly Rooted Hearsay Exception

As discussed previously, if the rule of necessity for admitting hearsay evidence is satisfied, the evidence may be admitted if it bears sufficient "indicia of reliability" to ensure accuracy in the fact-finding process. *Ohio* v. *Roberts, supra*, 448 U.S. at 65. This Court has declared that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with constitutional protection. *Roberts,*

19. As noted above, a hearsay statement may be admitted without violating the Confrontation Clause if it is both necessary and reliable. *Ante*, at 9-14. Although the question presented, as phrased by the petitioner, does not speak to this second requirement, amici respectfully ask this Court to address this point and to find that both the exception for spontaneous statements and that for statements made for purposes of medical diagnosis or treatment are firmly rooted, so that the reliability of evidence falling within them can be inferred without more.

supra, at 66. Thus, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ibid.*

The *Roberts* Court gave four examples of firmly rooted hearsay exceptions: dying declarations, cross-examined prior-trial testimony, public records, and business records. *Ohio* v. *Roberts*, *supra*, 448 U.S. at 66. These were not, however, intended to be the only exceptions classified as firmly rooted. Thus, *Inadi* added the co-conspirator exception to the list.

This Court has not identified specifically the material from which the foundations of a firmly rooted exception are to be built. In *Roberts*, however, the Court indicated that an exception is firmly rooted if it is such as to guarantee the reliability of virtually any evidence falling under that exception. *Ohio* v. *Roberts, supra*, 448 U.S. at 66, citing *Mattox* v. *United States, supra*, 156 U.S. at 244. Accordingly, as stated by one state supreme court, "the question of whether a hearsay exception is 'firmly rooted' does not turn upon how long the rule has been accepted but rather how solidly it is grounded on considerations of reliability and trustworthiness--the very reasons for the right to confrontation." *State* v. *Wyss*, 370 N.W.2d 745, 759 (Wis. 1985).

B. The Exception for Spontaneous Statements is Firmly Rooted

It has long been recognized that when a person is truly excited and she makes a statement about a concurrently or recently perceived event before having the opportunity to think through the possible consequences of her utterance, it is likely to be a reliable statement. See *People* v. *Farmer*, 765 P.2d 940, 951 (Cal. 1989). The exception to the hearsay rule for spontaneous statements was followed in English common law, and American cases employing the exception date back to the nineteenth century. *Puleio* v. *Vose*, 830 F.2d 1197, 1206 (1st Cir. 1987), *cert. denied*, 485 U.S. 990 (1988).[20/] "To borrow a

20. According to Professor Wigmore,
"The limits of the exception may be elusive and the practice in different courts may vary. But that the core and substance of such an exception is universally accepted cannot be open to doubt. [¶] Historically, this conscious recognition appears in England before the end of the 1700s . . . though it is only within the last few generations that it is firmly and unquestionably established. Such is, however, the inherent congruity of the doctrine that we are still able to resort to the earliest precedent for a succinct and accurate statement of the principle."

phrase succinctly employed in the Court's . . . recent refinement of the principle, the special evidentiary treatment accorded to spontaneous exclamations, is, we think, 'steeped in our jurisprudence.'" *Puleio, supra,* 830 F.2d at 1206, citing *Bourjaily* v. *United States, supra,* 483 U.S. at 183.

Recently this Court said,

> "[I]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. The basis for the 'excited' utterance exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that *therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy* and that cross examination would be superfluous."

Idaho v. *Wright*, *supra*, 110 S. Ct. at 3149 [emphasis added].

6 Wigmore, *supra*, § 1747, at 195.

Stated otherwise, the foundational requirements for admission of a hearsay statement under the spontaneous statement exception are themselves the guarantees of the statement's reliability. These requirements virtually assure that there is minimal chance that the statement will be inaccurate due to the declarant's misperception, fabrication, or faulty recall. (See *ante*, at 16-23.

Accordingly, the First Circuit Court of Appeals has declared, "In our view, it is indisputable that use of such spontaneous exclamations falls within one of the most deeply embedded of hearsay exceptions." *Puleio* v. *Vose*, *supra*, 830 F.2d at 1206. A number of other courts have agreed. E.g., *Haggins* v. *Warden*, 715 F.2d 1050, 1056-1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984); *United States* v. *Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *United States* v. *Cree*, 778 F.2d 474, 502 (8th Cir. 1985) (Oliver, J., dissenting); *State* v. *Jeffers*, 661 P.2d 1105, 1123 (Ariz. 1983), *cert. denied*, 464 U.S. 865 (1983); *People* v. *Gallego*,

802 P.2d 169, 198 (Cal. 1990); *Harrison* v. *United States*, 435 A.2d 734, 736 (D.C. App. 1981); *People* v. *Grover*, 451 N.E.2d 587, 591 (Ill. App. 1983); *State* v. *Porter*, 281 S.E.2d 377, 381 n. 1 (N.C. 1981); *State* v. *Bawdon*, 386 N.W.2d 484, 487 (S.D. 1986); *State* v. *Palomo*, 783 P.2d 757, 578 n. 3 (Wash. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 80 (1990).

The historical reasons for believing that spontaneous statements are inherently reliable have withstood the test of time. *People* v. *Farmer, supra,* 765 P.2d at 951. Accordingly, amici submit these statements fall within a firmly rooted exception to the hearsay rule, and a court need not independently inquire into their reliability.

C. The Exception for Statements Made for Purposes of Medical Diagnosis or Treatment is Firmly Rooted

The exception to the hearsay rule for purposes of medical diagnosis or treatment lacks the storied lineage

of that for spontaneous statements. The exception, as broadened to admit not only statements of present and past symptoms, but also statements of medical history and cause, has been widely accepted for slightly more than a decade.[21] See Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939, enacting Federal Rules of Court, Rule 803; *ante,* at 31 and n. 13.

As discussed previously, however, strong assurance of the reliability of statements made for medical purposes derives from the likelihood that the patient

21. The exception for the admission of statements for the purpose of medical treatment, insofar as it permits a doctor to relate a patient's report of present symptoms, has long been recognized. *State* v. *Wyss*, *supra*, 370 N.W.2d 745 at 758; Wigmore, *supra*, § 1714, at 90. Because the patient is describing her own physical sensations, the risks of misperception and of faulty recollection are minimal. Louisell & Mueller, *supra*, § 444, at 593. In addition, her interest in obtaining proper treatment gives her every reason to speak truthfully and carefully. *Ibid.* Accordingly, there is scarcely any dissent from the belief that a patient's recital of present symptoms and complaints for the purpose of diagnosis and treatment are inherently trustworthy, McCormick, *supra*, § 292, at 839-840; Gard, Jones on Evidence, § 10:7, at 270 (6th ed. 1972), and this exception is said to be among the most solidly founded within the hearsay rules, R. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. Rev. 257, 257.

understands the seriousness of the matter, and she realizes that the effectiveness of the treatment she receives will depend largely upon the accuracy of the information she provides. Accordingly, she is motivated to be truthful and careful, so that risks of insincerity and ambiguity are likewise minimal. *Ante*, at 31-33; see also *Idaho* v. *Wright, supra*, 110 S. Ct. at 3149. In addition, the doctor's interest in obtaining accurate and truthful information ensures that there is minimal risk of misperception on his part, that any ambiguities that might occur in his conversation with the declarant will be cleared away, and that there will be virtually no risk of misrecollection on his part. *Ante*, at 33.

The majority of jurisdictions[22] thus have recognized that the foundational requirements for admission of a statement made for purposes of medical diagnosis or treatment are themselves the guarantees of the statement's reliability: if the victim's motives are

22. See footnote 13 and accompanying text.

consistent with the purpose of the rule, and if it is reasonable for the physician to rely on the information in diagnosis or treatment, the statement is inherently reliable and trustworthy. Accordingly, although the exception, as set forth in Rule 803(4) of the Federal Rules of Evidence and similar state statutes, is relatively new in the jurisprudence, it is solidly grounded on the considerations of reliability underlying the right to confrontation and, hence, it is properly classified as "firmly rooted" within the meaning of *Ohio* v. *Roberts*, *supra*, 448 U.S. 56. See *State* v. *Maldonado*, *supra*, 536 A.2d 600, 604; *State* v. *Wyss*, *supra*, 370 N.W.2d at 759; Gard, Jones on Evidence, *supra*, § 10:7, at 270; Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. Miami L.Rev. 19, 44 (1985).

CONCLUSION

For the foregoing reasons, amici respectfully request that the decision of the Fourth District Appellate Court of the State of Illinois be affirmed.

DATED:

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